Supreme Court, U.S.
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NO. -

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent, Green Haven Correctional Facility,

Petitioner,

- against -

PABLO FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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MAY 13, 2005

QUESTION PRESENTED

Whether state rules of procedure govern the date on which an application for state post-conviction review is deemed filed, when the pendency of that application is advanced as a toll for the one-year statute of limitations period contained in 28 U.S.C. section 2244(d)(1)?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Christopher Artuz, Superintendent of the Green Haven Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 17, 2005, affirming the judgment of the district court which denied Artuz's motion to dismiss the habeas petition as timebarred pursuant to 28 U.S.C. § 2244(d).

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 402 F.3d 111 (2d Cir. 2005). The decision is reprinted in the appendix of this petition at pp. 1a – 11a.

The order of the United States District Court for the Southern District of New York (Wood, J.), is reported at 175 F. Supp. 2d 682 (S.D.N.Y. 2001). It is reprinted in the appendix at pp. 12a – 21a.

The Magistrate's Report and Recommendation (Peck, M.J.), is reported at 2001 U.S. Dist. LEXIS 6188 (S.D.N.Y. May 15, 2001). It is reprinted in the appendix at pp. 22a – 36a.

The Appellate Division's order denying Fernandez's petition for a writ of error coram nobis is reported at 273 A.D.2d 950, 714 N.Y.S.2d 625 (1st Dept. 2000). The Order of the New York Court of Appeals denying respondent Fernandez's application for leave to appeal from the order of the Appellate Division, First Department is reported at 92 N.Y.2d 897, 680 N.Y.S.2d 60 (1998) (Kaye, C.J.). The decision of the Appellate Division, First Department

unanimously affirming the judgment of conviction is reported at 249 A.D.2d 3, 670 N.Y.S.2d 840 (1st Dept. 1998). That memorandum decision is reprinted in the appendix at pp. 37a – 43a.

JURISDICTION

This petition for a writ of habeas corpus was filed in the Southern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. Petitioner Artuz moved to dismiss the petition as untimely and the Magistrate Judge so recommended. On November 6, 2001, the District Court declined to adopt the Report and Recommendation of the Magistrate Judge and instead denied petitioner Artuz's motion to dismiss the petition as timebarred. That court certified for interlocutory review, pursuant to 28 U.S.C. § 1292(b), the dispositive question of the applicability of the mailbox rule to state filings urged as a toll of the limitations period. See 28 U.S.C. § 2244(d)(2).

On or about November 30, 2001, Artuz moved the Second Circuit for an order granting leave to take an interlocutory appeal from Judge Wood's order. On March 13, 2002, the Second Circuit entered an order staying Artuz's application pending the outcome of Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134 (2002), in this Court. On August 29, 2003, the Second Circuit granted Artuz's request to appeal from Judge Wood's Order.

On March 17, 2005, the Second Circuit affirmed the District Court's denial of the motion to dismiss.

This petition for certiorari is filed within ninety days of the date of that order and is therefore timely. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d) of Title 28 of the United States Code provides:

(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in state custody pursuant to the judgment of the state court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively available to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Chapter 22, Section 600.2(a)(6) of the New York Codes, Rules and Regulations provides in pertinent part:

All papers filed may be filed either by personal delivery or by ordinary mail. If filed by mail, they shall be considered filed only upon receipt; and the envelope must be marked "Motion Papers." If an acknowledgment of receipt of the papers is desired, there must be enclosed with the papers being filed by mail a self-addressed postage-prepaid postal card bearing the title of the cause, the nature of the motion, the date on which it is returnable, and a statement of the papers filed. Such postal card, when stamped and returned by mail, shall serve as a receipt for the papers listed thereon.

STATEMENT OF THE CASE

The Trial Court Proceedings

In May, 1993, Jose Luis Marte, the head of a drug gang in the Manhattan Valley neighborhood of New York County, hired respondent Fernandez to kill Ramon Quintero. Quintero had threatened Marte after the latter had killed an acquaintance of Quintero's. On June 10, 1993, Fernandez shot Quintero to death in the presence of four eyewitnesses, including relatives and neighbors of Quintero. It was not until early 1995, when some of Marte's confederates began to cooperate with investigations into the drug trade in Manhattan Valley, that the eyewitnesses to the murder spoke to the authorities. Fernandez was arrested, charged, and was ultimately convicted, after trial, of Murder in the Second Degree.

After trial, the trial prosecutor discovered that a tangential trial witness, Police Officer Albert Melino, had sold cocaine to undercover New York State Troopers, four years before trial and a few months before being appointed a police officer. Defense counsel was apprised and Fernandez moved to set aside the jury's verdict on the grounds that the prosecution knew or should have known, and divulged to the

defense that, at the time of the trial, the officer was under investigation for the narcotics sale. Following a hearing, the motion was denied. Subsequently, the trial judge sentenced Fernandez to an indeterminate prison term of from twenty-five years to life.

The Proceedings in the Appellate Division

On direct appeal to the Appellate Division, First Department, Fernandez contended that the trial court should have granted a new trial because of the failure to disclose Officer Melino's criminal activity. Fernandez also claimed that the trial court erroneously admitted co-conspirator statements; that the exchanges between the court and the defense attorney were prejudicial; that the prosecutor improperly cross-examined a defense witness; that the People's summation was prejudicial; and that the court's reasonable doubt charge improperly shifted the burden of proof. In October of 1997, the People filed a brief addressing Fernandez's arguments.

On April 8, 1998, in a unanimous decision, the Appellate Division, First Department, affirmed the judgment of conviction in a five-page memorandum decision. 249 A.D.2d 3, 670 N.Y.S.2d 840 (1st Dept. 1998). Leave to appeal to the New York Court of Appeals was denied on August 18, 1998. 92 N.Y.2d 897, 680 N.Y.S.2d 60 (1998) (Kaye, C.J.).

By application dated September 15, 1999 and filed by mail, Fernandez, incarcerated at Green Haven Correctional Facility, petitioned the Appellate Division, First Department, for a writ of error coram nobis, claiming that he had not received the effective assistance of appellate counsel. That application was received by that Court on September 27, 1999. In an Order dated June 15, 2000, the Appellate

Division denied the application. People v. Fernandez, 273 A.D.2d 950, 714 N.Y.S.2d 625 (1st Dept. 2000).

The Proceedings in Federal District Court

By petition dated August 14, 2000, Fernandez sought a writ of habeas corpus from the United States District Court for the Southern District of New York. On behalf of Artuz, the State requested leave to file a pre-answer motion to dismiss the petition as time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), in particular 28 U.S.C. section 2244, as amended by the AEDPA. That request was granted and Artuz so moved.

Artuz argued that Fernandez's judgment became final on November 16, 1998, the end of the ninety day period within which Fernandez could have filed a petition for a writ of certiorari seeking Supreme Court review. Artuz observed that Fernandez had one year from that date – until November 16, 1999 – within which to file his petition, plus any time during which any properly filed post-judgment motions may have been pending. Fernandez had not filed until August 14, 2000, 272 days beyond the deadline.[1] Artuz acknowledged that Fernandez's state petition for a writ of error coram nobis, signed September 15, 1999, and received by the Appellate Division on September 27, 1999, tolled the limitations period during its pendency. He argued, however, that section 2244(d)(2)'s reference to a "properly filed" state application meant that state law governed the date of filing. He also noted that comity concerns required that state law be determinative. Hence, concluded Artuz, the coram nobis

[1] August 14, 2000, is the date petitioner signed his federal petition, and was assumed to be the date he handed it to prison officials for mailing. See Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 (1988).

petition was deemed filed upon receipt by the court (22 N.Y.C.R.R. 600.2[a][6]) on September 27, 1999, when the court received it. As a result, the pendency of the motion tolled only the period from September 27, 1999 until June 15, 2000, the date the Appellate Division denied it, a total of 262 days.[2] The habeas corpus petition had been filed ten days past the expiration of the AEDPA's one-year limitation period and was untimely.

On May 15, 2001, Magistrate Judge Peck issued a Report and Recommendation in which he recommended that the petition be dismissed as time-barred. Specifically, Magistrate Judge Peck agreed that Fernandez's judgment became final on November 16, 1998, that Fernandez's coram nobis petition tolled the one-year limitations period, and that the date on which it was deemed filed was the date of Appellate Division receipt. He explicitly refused to apply the federal prison mailbox rule, see Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 (1988). As a result, the state filing tolled insufficient time to render the habeas petition timely. Magistrate Judge Peck further recommended that Judge Wood grant a Certificate of Appealability on the applicability of the prisoner mailbox rule to state filings. On May 18, 2001, Artuz objected to the Report and Recommendation to

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[2] At the time Fernandez's coram nobis petition was denied, New York law did not provide for further appeal from the denial of a coram nobis petition in the Appellate Division. See Hizbullahankhamon v. Walker, 255 F.3d 65 (2d Cir. 2001), cert. denied, 536 U.S. 925, 122 S. Ct. 2593 (2002). The law has since been amended, and, effective November 1, 2002, appeals may be taken, by permission, from an order denying or granting a writ of error coram nobis. New York Criminal Procedure Law section 450.90(1).

the extent that it recommended granting a Certificate of Appealability even though Magistrate Judge Peck had not considered whether the petition stated a valid claim of the denial of a constitutional right.

On November 6, 2001, Judge Wood rejected the Report and Recommendation and denied the motion. In so ruling, Judge Wood rejected the argument that state procedural rules determine the date upon which a state motion to a state court is deemed file. Judge Wood held that the federal prison mailbox rule, as described in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 controlled any question of when Fernandez's state coram nobis application was filed in state court. Fernandez v. Artuz, 175 F. Supp. 2d 682 (S.D.N.Y. 2001).

First, she observed that in the absence of congressional guidance for interpreting "properly filed" in 28 U.S.C. § 2244(d), the Circuit Courts of Appeals had "struggled to find a rationale for choosing between the federal prison mailbox rule and state procedural rules to determine the date of filing." Fernandez v. Artuz, 175 F. Supp. 2d at 684. Asserting that the Circuit Courts of Appeals were "split" on the issue, Judge Wood noted that the Houston v. Lack holding and the prison mailbox rule itself are both "solid features of AEDPA jurisprudence." Id. at 685 n.2.

Judge Wood then discussed the three bases that had been advanced for applying the state rule as opposed to the federal mailbox rule, and rejected each stated rationale in turn. First, Judge Wood rejected the notion that the term "properly filed" as used in the tolling provision of 28 U.S.C. § 2244(d)(2) meant "filed under state law." According to the judge, the term itself gave no indication of Congress's intention with respect to application of the prison mailbox

rule in determining the date of filing of a state post-judgment motion. In fact, Judge Wood wrote, it is "precisely because federal statutes are unclear as to how to determine whether a paper has been 'received' that the federal mailbox rule developed[.]" Id. (emphasis omitted). Thus, Judge Wood explained, "in the context of litigation initiated by pro se petitioners, the prison mailbox rule functions as a rule of construction to determine when a court paper was 'filed,' and is used regularly to calculate running and tolling of federal statutes of limitations found in statutes[.]" Id. at 685-86. Accordingly, it was properly applied to state filings urged as a basis for the 2244(d)(2) toll.

Second, Judge Wood rejected the notion that comity required that a state's own rules of filing be applied. According to Judge Wood, the respect for state courts' procedural rules "is [not] affected one way or another by the interpretation of the word 'filing'" in section 2244. Id. at 686. This is because state proceedings are "necessarily completed" by the time a state prisoner files a federal petition for habeas corpus relief. Thus, "the district court's determination of whether a state habeas petition was 'properly filed' in state court . . . does not, and cannot, affect the state court proceeding." Id. at 686. Instead, concluded Judge Wood, "the importance of uniformity, among all habeas filers, of the event constituting 'filing' for all federal tolling purposes," id., should control, given that similar uniformity was a regular feature of federal jurisprudence in the limitations context.

Finally, Judge Wood observed that the interests served by the mailbox rule would best be served by applying the rule to state filings – because "federal courts have shown particular concern for prisoners whose applications are delayed by factors they are helpless to control," see Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379.

On November 13, 2001, the state requested that Judge Wood certify an interlocutory appeal of her order pursuant to 28 U.S.C. section 1292(b). On November 19, 2001, Judge Wood agreed and issued an amended pinion and order certifying that an interlocutory appeal was warranted.

On or about November 30, 2001, Artuz moved the United States Court of Appeals for the Second Circuit for an order granting leave to take an interlocutory appeal from Judge Wood's order. On March 13, 2002, the Second Circuit entered an order staying Artuz's application pending the outcome of Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134 (2001), in this Court.

On August 29, 2003, the Second Circuit issued an order granting Artuz's motion to appeal from Judge Wood's order.

The Second Circuit's Decision

On March 17, 2005, the Second Circuit affirmed Judge Wood's decision. Fernandez v. Artuz, 402 F.3d 111 (2d Cir. 2005). The Second Circuit acknowledged that the other circuit courts of appeals to consider the issue defer to the originating state's understanding of state filing laws, id. at 114-15, but found that because New York prescribes no filing deadlines for coram nobis petitions, the New York courts will never be called upon to decide whether the mailbox rule applies to them. Thus, the Second Circuit concluded, there is no real conflict between state law and federal law as to when a state motion is filed, and the mailbox rule should apply.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision superimposing the federal filing rule on state applications is inconsistent with the decision of every other circuit court of appeals that has ruled on the issue and is inconsistent with this Court's own view of "properly filed."

I. The Circuits are Now Split as to Whether the Convicting State's Rules of Procedure Determine When a Motion is Deemed Filed for Purposes of Calculating Section 2244(d)'s Limitations Period.

As is obvious from the preceding factual recitation, dispositive of the timeliness question here is the date upon which Fernandez's state motion was deemed filed. If it is deemed to have been filed when state practice deems the motion filed – upon receipt by the court – the petition is untimely. The Second Circuit, however, ignored the explicit state rule and extended Houston v. Lack's mailbox rule to the state filing, rendering the petition timely. In so holding, the Second Circuit announced a rule at odds with the rule endorsed by every other circuit court of appeals to consider this issue.

The date upon which a state motion is filed is significant in two contexts of habeas corpus practice. First, as in this case, the date of the filing of the state motion will determine precisely when tolling of the one year limitations period of 28 U.S.C. section 2244(d)(1) begins. See 28 U.S.C. § 2244(d)(2). Second, in those jurisdictions in which motions must be filed within a specified time period, the date of the filing will determine whether or not the claim raised in a post-judgment motion is procedurally barred. In both of these circumstances, each circuit court of appeals that has addressed this issue, save the Second Circuit in this case, has

held that there should be no impingement on state procedural rules concerning the date of filing.

For example, in the timeliness context, in Adams v. Lemaster, 223 F.3d 1177 (2000), the Tenth Circuit has rejected the notion that federal procedural law governs the date on which a state motion was filed for purposes of section 2244(d)(2). Instead, "[a]s a matter of federal law, we look to state law to determine when and whether a state petition was properly filed." Id. at 1182 n. 3. Finding no state law on point, the court attempted to predict what the New Mexico courts would do, id. at 1182. The court concluded that New Mexico would not apply the mailbox rule, but would consider the state motion filed on the date of its actual receipt in court.

Similarly, in Vroman v. Brigano, 346 F.3d 598 (6th Cir. 2003), the Sixth Circuit rejected the argument that the mailbox rule governs the date on which a state post-judgment motion was filed for purposes of section 2244(d)(2). The court noted that state law did not recognize the mailbox rule. As a general rule, the court reasoned, the federal courts "defer to a state's judgment on issues of state law and, more particularly, on issues of state procedural law" (Id. quoting, Israfil v. Russell, 276 F.3d 768 [6th Cir. 2001], cert. denied, 535 U.S. 1088 [2002]). It concluded that a state court's determination as to whether a motion had been timely filed governed whether the motion had been properly filed, and thus when it tolled the section 2244(d) limitations period. Id.

The Third Circuit, too, recognizes that state law governs. In Brown v. Shannon, 322 F.3d 768 (3d Cir.), cert. denied, 539 U.S. 948, 123 S. Ct. 2617 (2003), the Third Circuit considered whether a federal habeas petition was timely, and applied the federal mailbox rule to the state petitioner's state court filing. The Third Circuit applied the

rule, however, only after noting that the Pennsylvania state courts themselves apply the rule to prisoners' pro se filings. See Brown v. Shannon, 322 F.3d at 771, n.3; see also Luby v. Brady, 1996 U.S. Dist. LEXIS 8157, No. 95-26- SLR (D. Delaware 1996) (federal court will not apply mailbox rule to state filings where the state holds that papers not filed until received by court clerk).[3]

To be sure, in Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000), cert. denied, 533 U.S. 941, 121 S. Ct. 2576 (2001), and Saffold v. Newland, 224 F.3d 1087 (9th Cir. 2000),[4] the Ninth Circuit appeared to suggest that it was

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[3] While not explicitly stating that state rules of filing govern the date upon which state motions are deemed filed for purposes of 28 U.S.C. § 2244(d)(2), the Fifth Circuit did refuse to apply the Houston v. Lack mailbox rule to a Texas state filing. That court reasoned that to do so "would require [it] to interpret state rules of filing and to address the filing systems of state courts." Coleman v. Johnson, 184 F.3d 398, 402 (1999), cert. denied, 529 U.S. 1057, 120 S. Ct. 1564 (2000); see also Kestler v. Cockrell, 2003 U.S. App. LEXIS 17326 (5th Cir. 2003). Notably, Texas state courts do not apply the Houston v. Lack rule. See Kinnard v. Carnahan, 25 S.W.2d 266 (2000). For its part, the First Circuit has expressly declined to decide this issue, but has noted in one decision that to the extent it is a state issue, the originating state in question, Maine, has likewise reserved decision on whether to adopt the mailbox rule. See Donovan v. Maine, 276 F.3d 87, 91 n.3 (1st Cir. 2002), citing Finch v. State, 736 A.2d 1043 n.1 (Me. 1999).

[4] Saffold was amended at 250 F.3d 1262 (9th Cir. 2001), and was vacated and remanded by this Court as Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134. The opinion in Carey, however, did not address the question presented here.

constitutionally required to apply the Houston v. Lack mailbox rule to state filings for statute of imitations purposes. See Anthony v. Cambra, 236 F.3d at 575; Saffold v. Newland, 224 F.3d at 1091. But the petitions at issue in both of these cases were grounded in California judgments of conviction. And the California state courts apply the Houston mailbox rule as a matter of state law. See In Re Jordan, 840 P.2d 983 (1992). And while neither Anthony v. Cambra nor Saffold v. Newland state so explicitly, this is presumably the basis for Ninth Circuit's reliance on the federal mailbox rule in those cases.[5]

The identical conclusion has been reached by those circuit courts of appeals that have addressed the "properly filed" question in the procedural forfeiture context. For example, in Davies v. McCaughtry, 2000 U.S. App. LEXIS 7257 (7th Cir. April 14), cert. denied, 531 U.S. 962, 121 S. Ct. 392 (2000), the petitioner's petition for review in the Wisconsin Supreme Court was received three days after the filing deadline, and that court dismissed the petition as untimely.[6] On federal habeas review, the petitioner argued that under Houston v. Lack, the petition was timely because he had placed the petition in the prison mail system two days before the filing deadline. The Seventh Circuit rejected application of the Houston v. Lack rule to the state filing, and affirmed the District Court's finding that the petitioner had procedurally defaulted his claims by failing to present them to the state's highest court. Id. at *3-5.

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[5] In any event, even if the Ninth Circuit case could be read to support the Second Circuit's position, that support only underscores the split among the Circuits.

[6] Davies v. McCaughtry is an unpublished decision from the Seventh Circuit. The rules of that Court, however, apparently permit reference to the case outside the Circuit.

Similarly, in Maples v. Stegall, 340 F.3d 433 (6th Cir. 2003), the petitioner delivered his application for leave to appeal to the state Supreme Court to the prison mailroom some 53 or 54 days after the intermediate appellate court had denied his application. The application to appeal was received in court 57 days after the intermediate appellate court's decision, thus rendering it untimely under Michigan law, which requires that such an application be filed no more than 56 days after the intermediate appellate court's decision. Michigan's high court returned the application without filing it due to the procedural default. Maples v. Stegall, 340 F.3d at 435.

While observing that Houston v. Lack's prison mailbox rule is not binding on the state of Michigan, the Sixth Circuit found that the prison officials' inaction, which resulted in the application for leave to appeal being late, constituted cause to excuse the procedural default. Thus, the circuit court followed state procedural rules in finding that the petitioner's application was procedurally defaulted, id., though it went on to find cause for the procedural default and prejudice therefrom.

Finally, in Koerner v. Grigas, in the procedural forfeiture context arising from an untimely state filing, the Ninth Circuit rejected the argument that the federal mailbox rule would override the state's finding of untimeliness inasmuch as the convicting state's law deem papers filed only upon receipt. Koerner v. Grigas, 328 F.3d 1039, 1044 n.1 (9th Cir. 2003); see also Insyxiengman v. Morgan, 2005 U.S. App. LEXIS 5067 (9th Cir. 2005) (in deciding if a state timebar rule constitutes an adequate and independent state ground, Ninth Circuit examines state law to see if Washington accepts or rejects prison mailbox rule).

In short, only the Second Circuit has held that the mailbox rule must be applied to state filings urged as a toll of the one-year limitations period. This is inconsistent with the plain language of Artuz v. Bennett. Indeed, in construing 28 U.S.C. section 2244(d)(2) in that case, this Court made clear that a "properly filed application" is one which is filed consistent with the requirements of state law. Specifically,

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. . . . And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000) (citations omitted).

More recently, in clarifying Artuz, this Court distinguished between "filing conditions" including state time limits on the filing of post-judgment motions and "rule of decision" procedural bars. The Court explained that the former goes "to the very initiation of a petition and a court's ability to consider that petition." Pace v. DiGuglielmo, __

U.S.__, 2005 U.S. LEXIS 3705, *17 (April 27, 2005). This explanation emphasizes precisely what the Second Circuit ignored: that a properly filed petition is one which a state court recognizes as ready for consideration. If a state does not recognize a petition as ripe for its consideration – whether it is untimely or has not yet been received – it is not yet properly filed and does not yet qualify as a toll under section 2244(d)(2). Indeed, the Tenth Circuit has so understood Artuz even prior to the Pace gloss. The Second Circuit's conclusion, however, ignores the properly filed requirement. It reasoned that the date of filing question was not at issue in Artuz. Fernandez v. Artuz, 402 F.3d 111. But there is no suggestion in Artuz that the definition of "filed" relied upon by the Artuz court differs depending on the nature of the issue for which the word is being construed. After all, this Court relied upon the common meaning of the term "filed," a meaning that remains consistent regardless of its context.

Indeed, the Second Circuit had no sound basis for holding that the same language in the same subsection of the same statute has two different meanings. As this Court noted in Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265 (2002), a litigant in such circumstances should "explain why [the Court] should interpret the same statutory words differently in closely related contexts." Id. at 221; see also Wisconsin Department of Revenue v. William Wrigley, Jr. Company, 505 U.S. 214, 225 (1992). Two more closely related contexts could hardly be imagined than in this case. Indeed, they are inextricably intertwined. Thus, the language of the statute requiring a properly filed application should be given a consistent meaning, and should be interpreted in accordance with state rules governing filing.

II. The Second Circuit's Rule will have an Unfair and Confusing Effect With Respect to the Filing of Various Motions in the New York State Appellate Courts.

In rejecting Artuz's argument that state rules govern, the Second Circuit observed that, as far as the state filing at issue in this case was concerned, adoption of the Houston v. Lack mailbox rule would have no impact. The court's theory was that New York has no deadline for coram nobis petitions, and thus the state courts will never have to decide if the prison mailbox rule should apply to such motions. In the absence of such impact, the federal mailbox rule should apply when determining "when a state petition is 'properly filed' for purposes of tolling the AEDPA statute of limitations." Fernandez v. Artuz, 402 F.3d at 115. But the Second Circuit held that the federal mailbox rule applied to determine when "state petition[s]" are properly filed, and thus the court's rule will apply not only to motions without deadlines, but also to filings for which statutory deadlines.

Application of the federal mailbox rule to state motions with filing deadlines thus also divides the Tenth from the Second Circuit. In Adams v. Lemaster, the Tenth Circuit acknowledged that there was no deadline for the filing of the particular state motion urged as a toll in the case before it. Nevertheless, wrote the court, applying the mailbox rule,

> could lead to an obvious absurdity in the many states with filing deadlines for state petitions – a state court determination that a state petition was untimely, and the federal courts tolling the federal statute of limitations

> for the same petition because it was "properly filed." This approach contravenes common sense, the clear language of the statute, and our precedent.

Adams v. Lemaster, 223 F.3d at 1181; see Burger v. Scott, 317 F.3d 1133, 1135 (10th Cir. 2003); see also Garcia v. Shanks, 2003 U.S. App. LEXIS 24759 (10th Cir. Dec. 9, 2003); Truelove v. Smith, 2001 U.S. App. LEXIS 8822 (10th Cir. May 9, 2001).

This absurdity is evidenced even in the New York scheme which application of the mailbox rule purports to replace. The state filing rule that the Second Circuit's opinion overrode applies to all motions made in the Appellate Division, whether those motions must be made within a specific time or not. In New York, for example, although a petition for a writ of error coram nobis may be filed at any time, motions for leave to appeal from the denial of a collateral attack on the judgment of conviction made pursuant to New York Criminal Procedure Law section 440.10 must be made within 30 days after service of the order upon the defendant. New York Criminal Procedure Law § 460.10(4)(a); see Wedra v. LeFevre, 988 F.2d 334, 339 (2d Cir. 1993). Thus, under the Second Circuit's analysis, if such a motion is made to the Appellate Division in an untimely fashion and is denied, the post-judgment application will be deemed properly filed for section 2244(d)(2) purposes even though it is untimely under state law. Thus, the Second Circuit's decision creates chaos in what should be a straightforward analysis, and undermines the orderly administration of procedural default rules.

* * *

In sum, this Court should grant certiorari to end the split among the circuits and to clarify the confusion that will be created by the Second Circuit's rule.

CONCLUSION

For the aforementioned reasons, petitioner Christopher Artuz respectfully requests this Court to grant this petition for a writ of certiorari to review the judgment of the Second Circuit affirming the denial of Artuz's motion to dismiss.

Respectfully submitted,

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